87-692

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

CHARLES M. STARK
SPECIALIST FOUR, UNITED STATES ARMY,
PETITIONER,

v.

THE UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

WHETHER the military courts misconstrued petitioner's videotape evidence as testimonial rather than demonstrative, which erroneously gave the government an absolute confrontation right and thereby denied petitioner's right under the Fifth and Sixth Amendments to effectively present his only defense, insanity.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The Petitioner Charles M. Stark respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at 24 M.J. 381 (C.M.A. 1987) (Appendix A). The opinion of the Army Court of Military Review is reported at 19 M.J. 519 (A.C.M.R. 1984) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 31, 1987, affirming petitioner's conviction dated January 8, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. II 1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment V: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . ."

The Uniform Code of Military Justice provides:

Article 118, 10 U.S.C. § 918 (1982):

> Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being when he -
>
> (1) has a premeditated design to kill;
> (2) intends to kill or inflict great bodily harm;
> (3) is engaged in an act which is inherently dangerous to others and evidences a wanton disregard of human life; or
> (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;
>
> is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.

STATEMENT OF THE CASE

The petitioner was charged with unpremeditated murder of his wife, Emily Stark, on August 19, 1982, in Fuerth, Germany, by suffocating her with his hands. Circumstantial evidence had linked the petitioner to the death and, after interrogation, the petitioner rendered a sworn statement admitting that he "caused her death, but that it is not as simple as that, and that I did not mean for her to die." (Prosecution Exhibit 2).

The petitioner was tried at Fuerth, Germany, before a general court-martial composed of officer members on October 20, November 9 and 17, December 6, 15, 16, and 17, 1982, and January 8, 1983. He pled not guilty to the Charge and specification alleging unpremeditated murder in violation of Article 118, Uniform Code of Military Justice

[hereinafter cited as UCMJ], 10 U.S.C. § 918 (1982). The court-martial invoked jurisdiction pursuant to Article 2, UCMJ, 10 U.S.C. § 802 (1982).

Petitioner relied on the testimony of a forensic psychiatrist (Dr. Rollins) to assert a complete defense of insanity. In the defense's case-in-chief, Doctor Rollins opined that the petitioner, at the time of his wife's death, suffered from a mental disease that resulted in a significant probability that the petitioner lacked substantial capacity to conform his conduct to the requirements of the law (R. 568-573). Doctor Rollins based his opinion, in part, on his interviews with the petitioner on September 9 and 10, 1982 (R. 557). These interviews were videotaped and questions were asked while the petitioner was both under and not under the influence of hypnosis. The trial judge denied a defense motion to admit these taped interviews as the basis of Doctor Rollins' opinion (R. 535-540).

In rebuttal, the prosecution presented expert testimony including a forensic psychologist (Dr. Hall). Doctor Hall disagreed with Doctor Rollins' conclusions, basing his opinion, in part, on information he derived by viewing the videotapes of Doctor Rollins' interview (R. 655-662). Doctor Hall went on to attack Doctor Rollins' opinion and its basis in Doctor Rollins' analytic procedure. He dismissed Doctor Rollins' opinion as a misdiagnosis (R. 662), and testified that he was "not impressed" with the hypnosis of the petitioner (R. 663). In Doctor Hall's opinion, the hypnotic procedure was not reliable because the petitioner "wasn't really successful" in (a) hand levitation, (b) petitioner's voice "was not monotoned," and (c), at one point, the petitioner reacted to a "loud sound" in an uncharacteristic manner for truly hypnotized patients (R. 664). Throughout his testimony, Doctor Hall directly challenged the reliability of Doctor Rollins' procedure by referring to the "alleged hypnosis" (R. 676, 679).

After attempting to rehabilitate the petitioner's defense through Doctor Rollins' own testimony in surrebuttal (R. 731-746), the petitioner again moved to have the videotaped interview sessions played for the court members (R.749-750). While acknowledging that there would be "no prejudice to the government" by showing the tapes (R. 757), and that the

tapes were "probative" (R. 537), the judge denied the motion. The judge reasoned that he would not allow the tapes to be shown because viewing them would "create a tremendous administrative . . . impossibility to function [sic] for the court [and] would serve no real purpose" (R. 756) and that the prosecution would be denied the right to cross-examine the statements made in the tapes (R. 757).

Doctor Hall was then called by the Court to testify further about Doctor Rollins' procedure. Doctor Hall explained that he had never heard of the procedure employed by Doctor Rollins, and flatly stated that he had "some misgivings" about it (R. 759-761).

The court-martial entered findings of guilty to the charge of unpremeditated murder, and sentenced the petitioner to a dishonorable discharge, confinement for 50 years, total forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. The Army Court of Military Review affirmed the findings and the sentence. *United States v. Stark*, 19 M.J. 519 (A.C.M.R. 1984) (Appendix B).

The federal constitutional question involved has been substantially litigated at all stages of the appellate process. The issue granted by the Court of Military Appeals, as a prerequisite to this Court's jurisdiction, was as follows:

> WHETHER THE MILITARY JUDGE ERRED BY REFUSING TO ADMIT INTO EVIDENCE DEFENSE EXHIBIT J FOR IDENTIFICATION, THE VIDEOTAPES OF DR. ROLLINS' INTERVIEWS OF APPELLANT.

On August 31, 1987, the Court of Military Appeals affirmed the decision of the Army Court of Military Review, holding that "the admissibility of these tapes turns on Mil.R.Evid. 403" and "the admission of the tapes would have clearly given appellant an opportunity to smuggle eight hours of testimony before the court members without subjecting himself to the crucible of cross-examination." 24 M.J. at 385.

REASONS FOR GRANTING THE WRIT

In rejecting the petitioner's arguments for the admission of the videotapes after the government used the tapes to attack

the petitioner's expert's opinion, the lower military courts have fashioned a *per se* rule that deprived the petitioner the opportunity to present a defense of insanity. The military courts have rigidly applied a rule of evidence[1] which erroneously gave the government an absolute right of confrontation which prevents probative, non-prejudicial evidence on the central point of the defense position from being heard by the trier of fact. Such an onerous exclusion casts significant doubt upon the reliability of the trial result in this case and establishes a far-reaching precedent which materially restricts a defendant's due process right to present a defense.

I. BY REFUSING TO ADMIT THE VIDEOTAPES OFFERED BY THE PETITIONER, THE JUDGE DEPRIVED HIM OF A FAIR TRIAL THROUGH THE CREATION OF A PREEMINENT RIGHT OF CONFRONTATION AND CROSS-EXAMINATION IN THE GOVERNMENT.

The lower courts chose to exclude the highly probative tapes from evidence because of the misplaced reliance on the notion that the government has an absolute right to confront the witnesses against it. The petitioner firmly asserts that nowhere is the government given the unassailable right to cross-examine every bit of evidence produced at trial. The constitutional right to confront witnesses is given to the *accused*, not the government.

The petitioner fully recognizes that "[c]ross-examination of a witness is a matter of right." *Alford v. United States*, 282 U.S. 687, 691 (1931). He also does not dispute the fact that the rights of confrontation and cross-examination are "[c]ertain principles [that] have remained relatively immutable in our jurisprudence." *Greene v. McElroy*, 360 U.S. 474, 496 (1959). However, the status of a party's right to cross-examine evidence offered by an opponent does not rise to the level of preeminence to which the lower courts have elevated that right in this case.

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[1] Military Rule of Evidence 403 [hereinafter cited as Mil.R.Evid. 403] which is identical to Federal Rule of Evidence 403.

Every proponent's admission of evidence does not necessarily give rise to a cross-examination right in the opponent. Even an unavailable declarant's hearsay statement is admissible against a criminal defendant, if it contains sufficient indicia of reliability. *Ohio v. Roberts*, 448 U.S. 56 (1980). In petitioner's case, the government's right to cross-examination articulated by the lower courts pales in comparison, especially when there is no constitutional basis for such a right.

Asserting that the petitioner cannot offer direct, reliable, and probative evidence as a central part of his defense, merely because the government would not have an opportunity to cross-examine it, perverts the concept of due process. The lower courts have given the government a "constitutional" level protection at trial to the derrogation of the petitioner's firmly-rooted constitutional right to a fair trial.

Furthermore, even if the government was recognized as possessing a trial right that overshadowed an accused individual's constitutionally-based right to present a defense, adequate substitutes for that cross-examination were present in this case. *Delaware v. Van Arsdale*, 475 U.S. ____, 106 S.Ct. 1431 (1986). The government had an adequate opportunity to cross-examine the defense expert. They had an ample opportunity to present rebuttal evidence. (It was this rebuttal which provided the compelling need for the admission of the videotapes.) They had an ample opportunity to review the tapes prior to their being offered. They could have renewed their motion for discovery which had previously been denied. Finally, they could have been afforded appropriate limiting instructions by the trial judge (as conceded by the defense theory of admission). Additionally, the petitioner asserts that the government did not even *need* to cross-examine the statements made on the tapes: his assertion of the defense of insanity admitted the act of homicide.

The tapes were offered to corroborate Doctor Rollins' opinion and refute Doctor Hall's contrary assertions, and since Doctor Rollins already testified as to many of the statements uttered by the petitioner during the hypnotic session (R. 558-560), the court members were already aware of the

central issue in this case. They had already heard, through the recollection of the experts, what the petitioner's story was. Cross-examination would not have added anything substantial to the fact-finding process that was not already before the court members.

II. THE LOWER COURTS' OVERLY RIGID APPLICATION OF MIL.R.EVID. 403 IMPROPERLY DENIED THE PETITIONER'S RIGHT TO PRESENT A DEFENSE.

The lower courts have impermissibly used the rules of evidence to prevent the admission of highly relevant evidence offered by the petitioner to assert his defense of insanity. Such a use is constitutionally unacceptable. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Rock v. Arkansas*, ___ U.S. ___, 107 S.Ct. 2704 (1987). The heart of the petitioner's case was the expert opinion of Doctor Rollins, which was based upon the demeanor of the petitioner while under the influence of hypnosis. The videotapes of the petitioner's hypnotic session were the linchpin of Doctor Rollins' basis for that opinion. As the trial progressed, the central issue of the case became whether Doctor Rollins' opinion had any credence, especially in light of the vicious professional attack by a prosecution expert, Doctor Hall, and the fact that the petitioner's *mens rea* was the *sole* point of contention.

Given this background, the probative value of any evidence which would actually show whether or not the petitioner was in a hypnotic trance is very great. In fact, the trial judge admitted that the tapes were probative (R. 537). It cannot be overstated that the petitioner's entire defense rested upon *the court members' own* determination that Doctor Rollins had a plausible opinion. If the trial court decided that the most reliable evidence that the petitioner could offer to rebut the prosecution's highly discrediting and specific testimony was inadmissible, *where the judge was steadfast in his refusal to view the offered evidence before making his rulings* (R. 539, 749-757), then the trial court effectively denied the petitioner the fundamental right to present a defense. Thus, a rule of evidence was "applied mechanistically to defeat the ends

of justice." *Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curiam) (quoting *Chambers*, 410 U.S., at 302).

In the instant case, the lower courts intentionally blurred the evidentiary standards that separately govern both testimonial and demonstrative evidence. Recordings of conversations constitute demonstrative, as opposed to testimonial, evidence. *United States v. Onori*, 535 F.2d 938, 947 (5th Cir. 1976). Demonstrative evidence differs from testimonial evidence because demonstrative evidence does not possess the "limitations" of testimony. 4 Wigmore, Evidence §§ 1150, 1151 (Chadbourne rev. 1972). Demonstrative evidence is inherently reliable because it is to be *directly* perceived by the factfinder as existing or not. It does not rely on the memory or bias of a witness. There is no danger of drawing an incorrect inference from the evidence, as there is with a witness' perception of an event. *Id.* Given this inherent reliability, there is no need for cross-examination of facts that are to be directly perceived by the court members.

At trial, the judge decided that the statements made by the petitioner on the tapes would be unfair to the government if they could not cross-examine them. He therefore used testimonial rules to guide his exclusion of the tapes. It is evident that he intentionally did this because (a) he refused to view the tapes before he made a decision, and (b) he previously applied demonstrative standards to allow into evidence prosecution photographs depicting the victim in an effort to explain the pathologist's expert opinion on the cause of death. (R. 464-470).

The Court of Military Appeals noted that they were faced with a question of admissibility of "out-of-court statements relied upon by expert witnesses," but then acknowledged that this evidence was of a demonstrative nature. Despite the demonstrative characterization, the Court also chose to apply the same, erroneous, confrontation-based testimonial analysis.[2]

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[2] The Court of Military Appeals noted that the issue of whether the petitioner was hypnotized was "a fact contested by the Government's experts."

Such an analysis is, plainly, wrong. "There is no general rule that the voices of parties to a taped telephone conversation who do not appear at trial must be suppressed." *United States v. Ariza-Ibarra*, 605 F.2d 1216, 1224 (1st Cir. 1979). The petitioner's plight becomes especially noteworthy when the military courts relied on this scheme to unconstitutionally deprive the petitioner of his right to present his defense. "[T]o be admissible, the real evidence must be in substantially the same condition as at the time of the crime; must be properly identified; and must be relevant." 3 Torcia, C., Wharton's Criminal Evidence § 598 (14th ed. 1987). Under this general test, the evidence of the hypnotic interviews was as admissible as the photographs of Emily Stark's body.

Equally impermissible was the lower courts' insistence that Mil.R.Evid. 403 mandated exclusion of the videotapes. All the parties to the trial clearly understood that the admission of the tapes posed "no prejudice to the government" (R. 757). Doctor Rollins and Doctor Hall both provided ample testimony as to the objective indicia of successfully induced hypnosis and the misconceptions generally associated with the procedure. The petitioner offered the tapes into evidence with the understanding that the statements in the tapes would not be used to prove the truth of the matters asserted but merely as evidence of the basis of the expert's opinion. There was never any danger of misleading the members or confusing the issues: the members had been educated as to how to interpret the tapes. They knew specifically what to look for. They could easily have determined (a) whether the petitioner's hand levitation supported the testimony of Doctor Rollins or Doctor Hall, (b) whether the petitioner's voice was monotoned as described by Doctor Rollins and challenged by Doctor Hall, and (c) whether the petitioner reacted to a "loud sound" as asserted by Doctor Hall and refuted by Doctor Rollins.

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24 M.J. at 384. However, the court refused to address the demonstrative nature of the evidence in *surrebuttal*, totally focusing instead on the testimonial content of the evidence. In so doing, the court ignored the exact reason for which the defense offered the tapes in surrebuttal: to show the *facts* of the petitioner's actual behavior, *not* what was said during the interviews.

Rather than opening a new round of rebuttal-surrebuttal, this evidence would have served to close the information gap between the contending positions of the experts. It would have aided the fact-finder without confusion. It would have resolved the challenges to this linchpin in the petitioner's insanity defense, contrary to the prosecution, in favor of the petitioner. In a similar case involving an insanity defense the Second Circuit Court of Appeals opined that "[s]ince the probative value of the evidence proffered was so great, it should have not been excluded in the absence of a significant showing of unfair prejudice." *United States v. Dwyer*, 539 F.2d 924, 928 (2d Cir. 1976). Moreover, the introduction of videotapes into evidence to explain the basis of a challenged expert's opinion is currently practiced in several jurisdictions. *United States v. McCollum*, 732 F.2d 1419, 1422 (9th Cir.), *cert. denied*, ___ U.S. ___, 105 S.Ct. 301 (1984) (trial judge allowed the defense to present part of a videotape showing its expert's hypnotic procedure when the prosecution experts asserted, in rebuttal, that the defendant was not hypnotized during the defense expert's interview); *State v. Pratt*, 39 Md. App. 442, ___, 387 A.2d 779, 786, *aff'd*, 284 Md. 516, 398 A.2d 421 (1979) (regarding the admissibility of a psychiatrist's interview of defendant to explain the basis of his expert opinion of insanity, "an expert is not only permitted but may be required to demonstrate the basis of his opinion"); MacFarlane, *Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases*, 40 U. Miami L. Rev. 135, 144 (1985).

The petitioner is mindful of the proposition that "an individual's right to present evidence is subject always to reasonable restrictions." *Rock v. Arkansas*, ___ U.S. ___, 107 S. Ct. at 2715-16 (Rehnquist, J., dissenting). However, the lower courts have impermissibly created a government confrontation right and used the framework of evidentiary rules to lend the aura of reasonableness to their creation. In the instant case, the petitioner effectively lost his right to present an insanity defense when the military courts decided that this Fifth Amendment right was subordinate to a "greater" government confrontation right.

The petitioner realizes that perhaps he would not be allowed to introduce the videotape evidence if that evidence was somehow irrelevant, untrustworthy, or was designed to undermine any "reliability in the ascertainment of guilt and innocence," *Chambers v. Mississippi*, 410 U.S. at 302. Given the nature of the defense and the specific issues raised at trial, however, the lower courts could not constitutionally design a rule to exclude evidence who's trustworthiness is *not* "inherently unreliable." *Rock v. Arkansas*, ___ U.S. ___, 107 S.Ct. at 2715.

It is essential to note that even though the petitioner's counsel pointed out to the judge that the tapes had become much more relevant and probative in surrebuttal than previously, the judge still refused to view their contents before ruling or to have the prosecution demonstrate how they would unfairly prejudice the government. In fact, the judge recognized that *no* prejudice would accrue against the government upon the tapes' admission into evidence (R. 757). Against this background, the judge's rigid rulings, *in the absence of full knowledge* as to what was, in fact, on the videotapes, directly deprived the petitioner of his due process right to present his insanity defense against a murder charge.

III. EXCLUSION OF THE VIDEOTAPE EVIDENCE PRODUCED AN UNRELIABLE TRIAL RESULT BECAUSE THE GOVERNMENT'S PROOF OF SANITY WAS NOT SUBJECT TO "MEANINGFUL ADVERSARIAL TESTING."

The lower courts' rulings have fatally infected the trial with an absence of the fundamental fairness that a criminal defendant should constitutionally enjoy. The evidence contained in several short, critical sequences of the videotapes would have settled the issue of the petitioner's insanity. At the very least, the evidence would have raised a reasonable doubt as to sanity which the prosecution would have been again burdened to resolve. The lower courts, however, have given birth to an evidentiary scheme which prevents the petitioner from presenting all the evidence that was material and favorable to his defense. Such a scheme necessarily pre-

vented a fair trial. In *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), the defendant could not establish that the evidence he was estopped from presenting was, in fact, material and favorable. In this case, that threshold has been met.

The petitioner asserts that he had been denied the constitutional right to a *meaningful* opportunity to present a complete defense without a valid justification to excuse this denial. Such an unjustified exclusion of the videotapes has deprived the petitioner "of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." *Crane v. Kentucky*, ___ U.S. ___, 106 S.Ct. 2142, 2147 (1986).

In challenging the lower courts' ruling, the petitioner is mindful that he is not necessarily entitled to a "perfect trial." *Delaware v. Van Arsdale*, 475 U.S. ___, 106 S.Ct. 1431 (1986). He seeks, however, and is entitled to, the opportunity to "fairly . . . present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination." *Ake v. Oklahoma*, 470 U.S. 68, 82 (1985).

Although the facts of *Ake* and the instant case differ in many respects, the overall result to both defendants was a denial of the right to present a defense. Because he was afforded psychiatric assistance, the petitioner was in a better pretrial position than Mr. Ake. Unfortunately, the trial judge melted that potential advantage away and, in effect, denied the petitioner the same opportunity to fairly present his insanity defense. The petitioner's defense was rendered meaningless by the viscious attack by Doctor Hall on Doctor Rollins' credibility. It was then reduced to a nullity by the denial of the opportunity to present relevant, probative, credible evidence to show the court members the clearly discernible, objective basis supporting Doctor Rollins' opinion, refuting Doctor Hall's opinion.

The particularly distressing result of the trial is that the government was arbitrarily handed a "strategic advantage over the defense [which] cast a pall on the accuracy of the verdict obtained." *Ake v. Oklahoma*, 470 U.S. at 79. Given the importance of the fact of whether or not the petitioner was

under the influence of hypnosis, the court members *had* to see for themselves. They already possessed the requisite sophistication to view the few minutes of videotape necessary to decide this well focused issue. The court members should have been allowed to resolve the issue with all the evidence available, as they are capable of doing, and as the "framers of the Bill of Rights expected." *United States v. Torniero*, 735 F.2d 725, 734 (2d Cir. 1984). *Accord, United States v. Clifford*, 704 F.2d 86 (3d Cir. 1983); *United States v. McRary*, 616 F.2d 181 (5th Cir. 1980); *United States v. Ives*, 609 F.2d 930 (9th Cir. 1980); *United States v. Smith*, 507 F.2d 710 (4th Cir. 1974). The judge's exclusionary ruling deprived the court members of the evidence needed to assure a reliable verdict. The central question of which expert was to be believed was theirs to decide, *Barefoot v. Estelle*, 463 U.S. 880, 902 (1983), and the petitioner had the right to present the evidence needed to fairly present his defense to them.

CONCLUSION

The exclusion of the videotapes denied the petitioner a traditional, fundamental standard of due process, namely the right to a fair opportunity to present a defense. The lower

courts combined an evidentiary scheme with the creation of a perceived absolute right in the prosecution to override the petitioner's constitutional protections.

Respectfully submitted,

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Appendices

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS.

No. 51,666.
CM 444038.

UNITED STATES, APPELLEE,

v.

CHARLES M. STARK, SPECIALIST FOUR
U.S. ARMY, APPELLANT.

Aug. 31, 1987.

For appellant: *Captain Floyd T. Curry* (argued), *Lieutenant Colonel Paul J. Luedtke, Major Eric T. Franzen, Captain Bernard P. Ingold* (on brief), *Colonel William G. Eckhardt, Colonel Brooks B. LaGrua, Lieutenant Colonel Arthur L. Hunt, Captain Thomas J. Feeny, Captain David W. Sorensen, Captain Keith W. Sickendick, Captain Brian D. DiGiacomo.*

For appellee: *Captain Amaury R. Colon* (argued), *Colonel James Kucera, Lieutenant Colonel Adrian J. Gravelle, Major Byron J. Braun* (on brief), *Captain Andrew D. Stewart.*

OPINION OF THE COURT

COX, Judge:

A general court-martial composed of officers convicted appellant of the unpremeditated murder of his wife, in violation of Article 118, Uniform Code of Military Justice, 10 U.S.C. § 918. He was sentenced to a dishonorable discharge, confinement for 50 years, total forfeitures, and reduction to E-1. The convening authority approved the sentence, and the Court of Military Review affirmed the findings and sentence as approved. 19 M.J. 519 (1984).

We granted review on the following issues:

I

WHETHER THE MILITARY JUDGE ERRONEOUSLY ADMITTED STATEMENTS OF APPELLANT WHICH WERE INVOLUNTARY AS A MATTER OF LAW.

II

WHETHER THE MILITARY JUDGE ERRED BY REFUSING TO ADMIT INTO EVIDENCE DEFENSE EXHIBIT J FOR IDENTIFICATION, THE VIDEOTAPES OF DR. ROLLINS' INTERVIEWS OF APPELLANT.

During a pretrial Article 39(a)[1] session, trial defense counsel moved to suppress a statement made by appellant to agents of the Criminal Investigation Command (CID) because: (1) the statement was the product of an illegal seizure of appellant; (2) the investigating agents ignored his request to remain silent; and (3) the statement was obtained through the exercise of illegal coercive techniques.

On the morning of August 19, 1982, German police authorities notified the CID that they had found a woman's body which had been identified as Emily Stark. At the same time, appellant was at a military police station reporting his wife's absence for the second time that day. CID Agent Paul Peterson had appellant brought to his office to inform him that the body of his wife had been found.

Thereafter, Agent Peterson learned that he might be investigating a homicide and advised appellant of his rights under Article 31, UCMJ, 10 U.S.C. § 831. Appellant waived his rights and expressed his willingness to make a statement. At no time throughout this period was appellant's departure from the station restricted or prohibited. Appellant was then taken to the hospital to identify his wife's body and returned to the CID office at approximately 12:30 in the afternoon. There, he was questioned until about 2:30 p.m. The interview was terminated when appellant told the agents to either

[1] Uniform Code of Military Justice, 10 U.S.C. § 839(a).

"book him or let him go"; however, he did not leave the station immediately. Instead, he let the agents know that he did not want to go back to his barracks, expressing the desire to spend the night at the home of friends. Agent Peterson made arrangments for him to do so, and appellant agreed to return to the CID Office the next day to take a polygraph examination.

Appellant and the apartment where he was staying were kept under surveillance throughout the night. Although the agents had asked appellant's friends to transport him back to the office the following day, they were concerned that he might miss the appointment. Consequently, early in the morning, Special Agent Petersen drove to the apartment to get appellant; they returned to the CID office, and appellant was interviewed by a polygraph examiner. The examiner also advised appellant of his rights, including those pertinent to the administration of a polygraph examination. Again appellant waived his rights and agreed to take the polygraph examination. When the examination was completed, the examiner reviewed the charts and discussed the case with appellant. After further questioning, a second polygraph examination was administered. Appellant then expressed a desire to speak to his friends, and arrangements were made to bring them to the CID office. They talked with appellant for about 50 minutes; sometime thereafter he executed the written statement giving rise to the motion to suppress.

The military judge denied the motion to suppress, finding that: appellant had not been detained unlawfully; he had been warned of all his rights; he had given the confession freely and voluntarily; and he had not been subjected to any undue influence or coercion. The judge admitted the confession subject to corroboration.

I

The threshold question of whether a person has been "seized," "arrested," or "apprehended" is one of fact which must be resolved by examining all the details and circumstances in the context of military society. *United States v.*

Scott, 22 M.J. 297 (C.M.A.1986); *United States v. Schneider*, 14 M.J. 189 (C.M.A.1982); *United States v. Leiffer*, 13 M.J. 337 (C.M.A.1982); *United States v. Kinane*, 1 M.J. 309 (C.M.A.1976). "[N]ot . . . every interrogation at the 'police station' amounts to a custodial interrogation." *United States v. Schneider*, *supra* at 195 (footnote omitted). Appellant himself initiated contact with police authorities for the purpose of reporting that his wife was missing. The CID agent contracted appellant for the purpose of informing him of his wife's death. It was only after the agent learned that the wife died under suspicious circumstances that he attempted to interview appellant as a suspect. At that time, appellant was advised of his rights and obtained a waiver prior to the interview. When appellant required the agent to "book him or let him go," the agent did the latter. Further, the agent helped appellant arrange to spend the night at the home of some friends rather than return to his barracks.

There is nothing in the record to suggest that appellant's decision to return the following day for the purpose of taking a polygraph examination was not his own voluntary choice. The only arguable point that appellant might have is based on the fact that the CID agents showed up the following morning at his friends' house to transport him to the examination. Even under this circumstance, there was no force, compulsion, or order to report. We cannot speculate as to the course of conduct of the agent had appellant elected not to voluntarily go with the agents to the examination. Given the totality of the evidence before us, we conclude that appellant was never apprehended or arrested until after his confession had been freely and voluntarily given. We are satisfied that he was properly advised of his rights under Article 31 and the Constitution and that his decision to confess was the product of his own "unfettered will" to confess. *Compare United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), *with Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); *see also California v. Beheler*, 463 U.S. 1121, 1125 n. 3, 103 S.Ct. 3517, 3520 n.3, 77 L.Ed.2d 1275 (1983).

We are further convinced that appellant was not questioned after expressing a wish to remain silent. When appellant told the agents to "book him or let him go," they complied by letting him go. He voluntarily returned to take the polygraph examination the next day. Under these circumstances we are not convinced that the utterance of these words was a decision to exercise his "right" to remain silent; rather it was a decision to stop talking with the CID at that time. Because of the new rights warning given him by the polygraph examiner on the following day, we are satisfied that appellant's rights were not violated. *Michigan v. Mosley,* 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); *see United States v. Hill,* 5 M.J. 114 (C.M.A.1978); *United States v. Collier,* 1 M.J. 358 (C.M.A.1976); *United States v. DeChamplain,* 22 U.S.C.M.A. 150, 46 C.M.R. 150 (1973). We also observe that, unlike the accused in *United States v. Applewhite,* 23 M.J. 196 (C.M.A.1987), appellant never at any time invoked his right to consult with a lawyer. *See United States v. Harris,* 19 M.J. 331 (C.M.A.1985), *rev'd. on reconsideration,* 21 M.J. 173 (C.M.A.1985); *United States v. Muldoon,* 10 M.J. 254 (C.M.A.1981); *see also Smith v. Illinois,* 469 U.S. 91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984); *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

Finally, we are convinced beyond a reasonable doubt that the statement was not the product of unlawful coercion. *United States v. Schneider, supra.*

II

The second granted issue was raised in the following factual context. Appellant defended against the charge claiming a lack of mental responsibility or insanity. Prior to the testimony of the defense expert psychiatrist, Dr. Bob Rollins, defense counsel moved the admission into evidence of videotapes of the interview of appellant conducted by the witness. The tapes were offered to aid the court members in evaluating the opinion of the psychiatrist. The members "would be able to see his [appellant's] reaction, to see how he responded to questions, to basically be able to put their own

evaluations and to invite – to legitimately evaluate . . . [the doctor's] opinion." Also, appellant's expert witness claimed that appellant was hypnotised during some of the interviews, a fact contested by the Government's experts.

The Government objected to the admissibility of the videotaped interviews on two grounds: First, that evidence adduced under hypnosis is not reliable; second, that the evidence is hearsay and would permit appellant to offer his testimony to the members without being called as a witness. The military judge sustained the objection, reasoning that the tapes "would be a left-handed way of putting . . . [appellant] on the stand and not being subject to" cross-examination. He also reasoned that the testimony would be cumulative because it was already before the court members through the testimony of the experts.

It should first be noted that the military judge did not predicate any of his rulings on the fact that appellant may or may not have been hypnotised. We are not confronted with deciding the question of whether *hypnotically-refreshed testimony* or statements given by an accused under the influence of hypnosis are admissible in evidence. *See Rock v. Arkansas*, ___ U.S. ___, 107 S.Ct. 2704, 96 L.Ed.2d ___ (1987); *United States v. Robinson*, 21 M.J. 937 (A.F.C.M.R.1986), *pet. granted*, 23 M.J. 167 (1986). Thus, although we agree with the Court of Military Review's conclusion that the tapes were not *per se* inadmissible because of the influence of "hypnosis" on the interviews, we do not attempt to fashion a rule of law governing this type of testimony. 19 M.J. at 526. We are confronted, however, with the admissibility of out-of-court statements relied upon by expert witnesses in the formulation of their opinions.

Mil.R.Evid. 703, Manual for Courts-Martial, United States, 1969 (Revised edition), provides that an expert opinion may be based upon "facts or data . . . made known to the expert, at or before the hearing. . . . [T]he facts or data need not be admissible in evidence." The military judge concluded that the psychiatrist could base his expert opinion on the videotaped interviews and indeed could discuss his reliance upon the interviews during his testimony.

Mil.R.Evid. 801(c) defines hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Appellant contended at trial and now that the tapes were not being offered "for the truth of the matter" but rather for other legitimate purposes. For example, the tapes would attack the credibility of the Government expert's opinion and bolster the defense expert's opinion to prove that there was an underlying factual basis for his opinion.

This situation has been described as a possible attempt to " 'smuggle' " hearsay evidence into the case under the guise that it is not being offered for "the truth of the matter asserted" and thus falls without the definition of hearsay. It is "suggest[ed] that Rule 403 is an appropriate tool for handling the problem. Some explanation for the expert opinion should be provided, but the judge should make sure that no party takes unfair advantage of Rule 703." S. Salzburg, L. Schinasi, and D. Schlueter, *Military Rules of Evidence Manual* 596 (2d ed. 1986).

We agree that admissibility of these tapes turns on Mil.R.Evid. 403.[2] That rule provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

We have reservations that evidence which is clearly "exculpatory" or which tends to make it less likely that an accused committed an offense could be excluded because of considerations "of unfair prejudice" to the Government. *See*

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[2] Before analyzing the military judge's ruling under Mil.R.Evid. 403, another distinction is helpful. The avowed purpose for offering the videotapes was to help the members to understand the expert's testimony. This type of evidence has come to be know as "demonstrative" evidence. *United States v. Heatherly*, 21 M.J. 113 (C.M.A.1985). The decision to permit or deny the use of demonstrative evidence has generally been left to sound discretion of the trial judge. *See generally* Annot., 9 A.L.R.2d 1044 (1950); 41 A.L.R. 4th 877-954 (1985).

United States v. Gipson, 24 M.J. 246 (C.M.A.1987); *see also Rock v. Arkansas, supra.* If the evidence is confusing "or misleading," or a "waste of time" (which we take as another way of describing a lack of relevance) or a "needless presentation of cumulative evidence," most certainly a military judge can rule the evidence inadmissible.

Here we conclude, as did the Court of Military Review, that the military judge properly excluded the videotapes.[3] First, he permitted the psychiatrist to testify as to the basis of his expert opinion, including testifying about the videotapes and the "hypnotic" interviews. Second, the admission of the tapes would have clearly given appellant an opportunity to smuggle eight hours of testimony before the court members without subjecting himself to the crucible of cross-examination. *State v. Chase*, 206 Kan. 352, 480 P.2d 62 (1971). Third, as noted by the Court of Military Review, the use of hypnotised testimony itself is not without controversy and may be confusing and misleading. *Rock v. Arkansas, supra.* Fourth, the judge ruled that it was "not necessary" for the "court members [to] . . . see the process that he [the psychiatrist] went through in order for them to be able to understand and to determine and apply the basis of his finding as to the ultimate conclusion." Finally, appellant was not denied any opportunity to offer evidence in his own defense, as his

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[3] While the admissibility of videotapes of the psychiatric interview presents us with a novel question, various states have confronted the issue and resolved it in various ways. *Compare People v. Cartier*, 51 Cal.2d 590 335 P.2d 114 (1959); *State v. White*, 60 Wash.2d 551, 374 P.2d 942 (1962); *with State v. Chase*, 206 Kan. 352, 480 P.2d 62 (1971). In *Chase*, the trial judge held videotapes of a psychiatric interview of the defendant while under the influence of sodium amytal (a truth serum) was inadmissible, "reasoning that by this means the defendant's version of the facts and the circumstances would be shown to the jury *without being tested by cross-examination.*" *Id.* at 66 (emphasis added). The Supreme Court of Kansas affirmed, finding no abuse of discretion because the doctor "carefully and articulately explained his purpose in administering the drug, its effect on defendant and the benefits derived in evaluating defendant's mental condition." *Id.* at 67. *See also State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (App.1981); *Marshall v. State*, 620 P.2d 443 (Okla.Cr.App.1980); *State v. Taggart*, 14 Or.App. 408, 512 P.2d 1359 (1973).

expert was allowed to testify fully, and there was no limitation on appellant's ability to testify in his own defense.

Based upon our review of the record, we are satisfied that the military judge did not improperly rule the videotapes inadmissible. Accordingly, there was no error prejudicial to the rights of appellant.

The decision of the United States Army Court of Military Review is affirmed.

Chief Judge EVERETT, and Judge SULLIVAN, concur.

APPENDIX B

UNITED STATES ARMY COURT OF MILITARY REVIEW.

CM 444038.

UNITED STATES, APPELLEE,

v.

SPECIALIST FOUR CHARLES M. STARK, SSN 076-38-0065, UNITED STATES ARMY, APPELLANT.

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24 Sept. 1984.

Captain Bernard P. Ingold, JACG, argued the cause for appellant. With him on the brief were Colonel William G. Eckhardt, JAGC, Lieutenant Colonel Arthur L. Hunt, JAGC, and Captain Thomas J. Feeney, JAGC.

Captain Andrew D. Stewart, JAGC, argued the cause for appellee. With him on the brief were Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, and Captain Richard J. Fadgen, JAGC.

Before SUTER, RABY and COHEN, Appellate Military Judges.

OPINION OF THE COURT

RABY, Senior Judge:

Contrary to his pleas, appellant was convicted of the unpremeditated murder of his wife in violation of Article 118, Uniform Code of Military Justice [hereinafter cited as UCMJ], 10 U.S.C. § 918 (1976). He was sentenced to a dishonorable discharge, confinement at hard labor for 50 years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. The convening authority approved the findings and the adjudged sentence.

I. THE FACTS

Appellant's wife, Emily, had been in Germany only ten days at the time of her death. Prior to her arrival on or about 8 August 1982, the appellant had received permission for Emily to stay with Sergeant Worth's family and had phoned Emily from Sergeant Worth's home. While it is apparent that Emily and the appellant were experiencing marital difficulties prior to Emily's arrival in Germany (Sergeant Worth overheard telephone conversations regarding divorce), contradictory evidence regarding the nature and degree of this discord was adduced at trial (appellant informed Specialist Four McBride that Emily wanted a divorce, but Emily told Mrs. Worth that she loved her husband and wanted to stay with him). Emily lived with Sergeant and Mrs. Worth from the time she arrived in Germany until her death.

On the evening of 18 August 1982, Emily was the Worth's home and the appellant was at the Pinder and Nashville clubs. At about 2350 hours, Emily called appellant because she was worried about him. Although appellant indicated he would come home shortly, he did not return until about 0120 hours, 19 August. Emily appeared worried but not angry that the appellant was late. Mrs. Worth went to bed just as appellant arrived and did not overhear any conversation.

During an interview conducted on 19 August 1982, appellant gave an agent of the Criminal Investigation Command (CID) the following information. He claimed that upon his late return to the Worths' quarters his wife became upset, criticized him, and left the house. Approximately 20 minutes later, when Emily failed to return, appellant searched for her and reported to the military police that she was missing. In a subsequent confession (Prosecution Exhibit 2) which we find properly admitted at trial (*see* IV, *infra*), appellant claimed he thereafter continued to search for Emily and found her walking along the road near the canal. Appellant asked Emily to get into the car and she refused. When appellant persisted, Emily became verbally abusive. She called appellant "a nobody," a "pompous ass," and other names. She insulted appellant's father and deceased mother, praised her family, and made remarks calculated to anger appellant and to hurt him

emotionally. Appellant told Emily to stop saying these things, grabbed her, and shook her, but Emily persisted in her remarks. When appellant grabbed Emily a struggle ensued. Emily scratched appellant and he pushed her to the ground. She hit the pavement hard, and appellant told her to get in the car. Emily refused and again insulted appellant and his family. Appellant begged Emily to stop and put his hand over her mouth to silence her. Appellant denies knowing how long he held Emily or if she struggled against him. When he let her go, she fell to the ground. Appellant knelt beside Emily and realized she wasn't breathing. He attempted to revive her by both cardio-pulmonary and mouth-to-mouth resuscitation, but his efforts were unsuccessful. Appellant moved Emily's body and laid it "in the bushes next to the road," because he did not want her body lying in the street. Appellant maintains that he then returned to the Worths' quarters.

At approximately 0330 hours, appellant entered the Worths' bedroom and announced that Emily had left the house following a discussion with him and that she had taken her purse. Mrs. Worth observed that appellant's eyes "were kind of glaring – dazed" and she found it odd that Emily had taken her purse as Emily had not taken her purse on other occasions when she walked. Appellant then left, saying that he was going to look for Emily.

Sergeant Forth informed the court that at about 0330 hours, during his duty as desk sergeant, appellant had entered the station and reported Emily missing. Sergeant Forth noted that appellant had appeared to be agitated, hurried, and quite excited. He also noticed that there were three scratches on the outside of appellant's left bicep, which Sergeant Forth believed to be "fingernail scratches." Appellant did not appear intoxicated at that time.

The Chief of the Department of Pathology at the U.S. Army Hospital at Nurnberg, Major Roger M. Fossum, MC, conducted the autopsy on Emily's body. Emily weighed between 160 and 170 pounds, as compared to the accused who then weighed 157 pounds. Major Fossum placed Emily's time of death between 0300 and 0600 hours, 19 August 1982,

noting that, based upon his experience, he "would lean toward the earlier time frame within that" period, somewhere from 0300 to 0500 hours. The cause of death was asphyxia due to suffocation. Major Fossum identified numerous external abrasions or scrapes of the skin in the facial area and a few such marks on the right arm of the body. There were numerous petechial hemorrhages[1] within Emily's eyes and eyelids, on her neck, and on her left shoulder. Two superficial, parallel, linear scratches or abrasions were found on her left nostril. Other minor abrasions were located on both cheeks and also over the bridge of her nose. Two slight, reddish areas of discoloration were detected on the top of her scalp. There was a large abrasion, about six centimeters long, on her right mid-forearm and there were several small abrasions and scratches around the front the back elbow area of her right arm. There was a large area of contusion and abrasion inside her mouth and there were contusions and abrasions on the inside of her upper and lower lips. The fingernails on the middle and small fingers of her left hand were broken and one of these breaks appeared to be fresh.

Major Fossum stated that the injuries to Emily's lips and mouth, in the "greatest likelihood," were caused by forcibly placing a hand across Emily's mouth and, perhaps, her nose. The scratches on Emily's nose were likely caused either by the appellant or by Emily's fingernails when she attempted to pull the appellant's hands from her face. The presence of certain petechial hemorrhages on both sides of Emily's neck coupled with the damage to the inside of both her upper and lower lips and to her right cheek, is evidence that two separate though interrelated forces were applied to her body. The primary force, most likely, was caused by the placement of the left arm "around the neck from behind with the crook of the elbow towards the front of the neck with considerable pressure . . . causing obstruction, perhaps collapse, of the trachea . . . or closure of the jugular veins . . . and quite

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[1] Petechial hemorrhages are tiny purple spots on the skin caused by ruptured blood vessels.

possibly also the carotid arteries." Major Fossum opined that quite likely both of these forces (the hand over the mouth and the left arm around the neck) occurred at the same time. The damage to Emily's inner mouth would require a moderate to severe amount of force. It would require fair to considerable pressure on the mouth to prevent a person from talking, but only slight pressure on the throat to do so.

Major Fossum further stated that a victim being smothered, if conscious and otherwise capable of normal response, would most likely struggle and attempt to disengage whatever is causing the asphyxia, perhaps causing injuries to an assailant. The most likely injuries to such an assailant would be scratching inflicted by the victim's fingernails.

Major Fossum also informed the court that photographs taken of the appellant on 19 August 1982 revealed several superficial scratches or abrasions on appellant's left arm, chest, and neck areas. (Slides 1 through 8, Prosecution Exhibit 7). The scratches on appellant's left arm are consistent with a defensive wound inflicted by Emily's fingernails.

Major Fossum opined that the manner in which the assailant grabbed Emily would normally result in loss of consciousness within 30 to 45 seconds or perhaps as early as 15 seconds. If Emily were struggling very hard, however, causing the assailant's grip to lossen occasionally, the period prior to loss of consciousness could have been prolonged. The relatively small number of petechial hemorrhages on Emily's body tends to indicate that a very brief struggle occurred before loss of consciousness. While normally it would take approximately four or more minutes of pressure for death to occur due to the constriction of a victim's air supply, the heart can stop within 20 seconds if the blood supply to the brain is cut off. Emily had a relatively minor degree of impairment of blood vessels of the heart. Normally this would be of no medical significance, but in view of the circumstances described above, the rapid reduction in her blood flow may have created a conduction defect which greatly increased the likelihood of a fatal arrhythmia. The likelihoold of cardiac arrhythmia would also be increased if Emily were in a highly

emotional state at the time of the incident. There is no way to determine when cardiac arrest, which occurs in all deaths, occurred. Physical signs on the body, such as hemorrhaging and pulmonary edema, indicate that a certain amount of time passed during which Emily was in appellant's grasp. It is unlikely that this was a "grab, die type time frame." The large bruise on the top, left center of Emily's head was caused by some "blunt instrument." The nature and location of this bruise make it very unlikely that it occurred in a fall because it is consistent only with a headlong movement into something. The bruise could, however, have been caused by the chin of a taller person who was holding Emily with his hand on her mouth and his arm around her neck.

II. RESOLUTION OF CERTAIN CONTROVERTED FACTS

In clarification of certain controverted facts, this Court makes the following factual findings pursuant to our statutory authority. Article 66, UCMJ, 10 U.S.C. § 866 (1982).

The appellant and his wife were experiencing marital difficulties. The accused wanted a divorce, although his wife still loved him.

The appellant killed his wife before he returned to the home of Sergeant and Mrs. Worth. The cause of death was asphyxia due to suffocation. He subsequently departed the Worths' home and went to the military police station. At both places he attempted to establish an alibi.

Before Emily's death, appellant pushed her to the ground because she was insulting him and his family. He knew she hit the pavement of the street fairly hard. The top of Emily's head was not brusied in this fall. Emily continued to insult the appellant.

Appellant grabbed Emily, placing his left arm around her throat and his right arm over her face and nose. Appellant constricted Emily's air supply by this hold.

Emily struggled hard to break appellant's hold and to get oxygen into her lungs. Appellant exerted great pressure on

Emily's mouth and nose and around her neck, thereby preventing Emily from breaking loose.

Emily repeatedly scratched appellant's left arm during this struggle and additionally scratched her own nose in an attempt to pull appellant's hand from her face.

Appellant placed his chin on the top of Emily's head to help him resist her struggling and, thus, bruised the top of her head.

Emily broke at least one fingernail while defensively scratching at appellant during this struggle.

Appellant was aware that he was cutting off Emily's air supply during the struggle and he intended to do so.

Appellant continued his hold on Emily for an indeterminate period of time after she became unconscious.

III. SUFFICIENCY OF THE EVIDENCE

Appellant asserts that the evidence is insufficient to support appellant's conviction of unpremeditated murder. We disagree.

Taken as a whole, the testimony of Major Fossum, the autopsy report, the photographs at Prosecution Exhibit 7, and the admission of the accused at Prosecution Exhibit 2 prove beyond a reasonable doubt that Emily Sue Stark is dead, that she died at the time and place alleged, and that her death, medically caused as described by Major Fossum, resulted from the act of the accused in grabbing her by the neck, mouth, and nose in a manner which constricted her air supply.

The killing of Emily Stark was unlawful, as it was done without legal justification or excuse. It is accpeted as true that prior to her death she insulted appellant and his family. The accused, by his own admission, became uncontrollably angry and grabbed her. It is also accepted as true that this killing was done in the heat of sudden passion and was not (and was not alleged to be) premeditated. However, this fact does not suffice to reduce appellant's criminal culpability. In order to reduce a charge of unpremeditated murder to a lesser offense, heat of passion must be accompanied by ade-

quate provocation. *United States v. Maxie,* 23 C.M.R. 942, 951 (A.F.B.R. 1957), *aff'd,* 25 C.M.R. 418 (C.M.A. 1958). Although heat of passion is a subjective determination, adequate provocation is an objective concept. *United States v. Seeloff,* 15 M.J. 978 (A.C.M.R. 1983). It has been long and consistenly recognized in military law, and rightfully so, that insulting, abusive, teasing, or taunting remarks, standing alone, do not constitute an adequate provocation to reduce murder to voluntary manslaughter. *United States v. Seeloff, supra; United States v. Maxie, supra; United States v. Edwards,* 11 C.M.R. 350 (A.B.R. 1953). Thus, we find that appellant's heat of passion was not produced by adequate provocation and that appellant cannot, therefore, rely on Emily's verbal conduct as an excuse for his actions.

We futher find that, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon Emily Stark. The intent to kill or inflict great bodily harm can be proved by circumstantial evidence. *United States v. Barnes,* 15 M.J. 121, 123 (C.M.A. 1983). *See also United States v. Leonard,* 41 C.M.R. 353 (C.M.A. 1970); *United States v. Aragon,* 1 M.J. 662, 665-66 (N.C.M.R. 1975); *United States v. Burke,* 28 C.M.R. 604 (A.B.R.1959). "It may be inferred that a person intends the natural and probable consequences of an act purposely done by him." Paragraph 197*c*, Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter cited as MCM, 1969].

We are mindful that appellant has never acknowledged an intent either to kill his wife or to do her great bodily harm. The evidence adduced at trial, however, was extensive and included an autopsy report, expert medical testimony regarding the cause of any physical circumstances surrounding the victim's death, psychiatric testimony as to the appellant's state of mind at the time of his wife's death, the appellant's self-serving, sworn statement regarding the circumstances surrounding the death, photographic evidence of the conditions of both the victim's body and the appellant's body within a few hours of the incident, and the testimony of other witnesses to whom appellant made relevant comments either concerning his relationship with his wife or regarding the

cirumstances surrounding her departure that evening from the Worth's residence. This evidence concerning accused's state of mind, although circumstantial, proves beyond a reasonable doubt that appeallant had the requisite criminal intent when he killed Emily Stark. The accused had a reason to rid himself of his wife (he wanted a divorce) and he was provided the opportunity to do so permanently when his wife provoked him to violence on a deserted road. Based on the competent evidence of record, this Court finds that there exists no reasonable doubt regarding appellant's intent at the time of this incident. The manner in which he grabbed his victim-simultaneously around the throat and by the mouth and neck-is consistent with an intent to kill or to inflict great bodily injury. Further, the degree of forcse he used against a struggling victim and his disregard for her obvious resistance are not consistent with an intent merely to stop the victim from talking, but rather are consistent with and indicative of an intent to kill or to do great bodily harm. Moreover, the accused's consciousness of guilt is reflected in his subsequent attempts to establish an alibi at the Worths' home and at the military police station. The triers of fact heard the witnesses, reviewed the admitted documents, and evaluated the weight to be given each. Like the court members, we are convinced beyond a reasonable doubt of the appellant's guilt. We therefore find this assignment of error to be without merit.

IV. ADMISSIBILITY OF APPELLANT'S PRETRIAL STATEMENT

Appellant asserts that the military judge committed prejudicial error by admitting Prosecution Exhibit 2, a pretrial inculpatory statement rendered by the appellant on 20 August 1982. Appellant argues that this statement was involuntary as a matter of law because it was the result of appellant's unlawful detention and was obtained in violation of his right to remain silent. We find this argument to be without merit.

We find that appellant was properly advised of his right to remain silent in accordance with Article 31, UCMJ, 10 U.S.C. § 831, and of his rights to counsel pursuant to *Miranda v.*

Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967). He was timely warned of these rights at least twice, first on the morning of 19 August 1982 and again on the morning of 20 August 1982. He knowingly, intelligently, voluntarily, and affirmatively waived these rights on each occasion and he did not thereafter attempt to withdraw these waivers.

We find that appellant was not unlawfully detained by law enforcement agents at any time during interrogation and that appellant's statement, Prosecution Exhibit 2, was the product of neither coercion, duress, undue influence, nor unlawful inducement, but was, rather, freely given and voluntarily made.

We find that appellant's request on 19 August 1982 that the CID "book him or let him go" was ambiguous as to his desire to invoke his rights to silence. We recognize the duty of law enforcement personnel to scrupulously honor a suspect's right to halt interrogation. *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); *United States v. Muldoon*, 10 M.J. 254 (C.M.A. 1981); *United States v. Hill*, 5 M.J. 114 (C.M.A. 1978). Assuming, *arguendo*, that appellant's ambiguous demand was sufficient to alert criminal investigators that he desired to exercise his rights in some manner, we find that the agents responded correctly. Following appellant's remark, they voluntarily ceased interrogating the appellant regarding Emily's death. Criminal investigators are not mind readers; when a suspect makes an ambiguous statement regarding his rights, interrogators may ask reasonable questions in order to ascertain exactly what rights, if any, the suspect wishes to assert. Assuming, without deciding, that the CID initiated such administrative questions in this case, we find that such inquiry was not prohibited and did not constitute a continuation of the criminal interrogation process.

We find that when the accused directed the interrogators to "book him or let him go" he was not requesting a permanent termination of interrogation. In any event, we find that appellant knowingly, intelligently, and voluntarily consented to return the next day to the CID office for further interrogation.

We find that the appellant returned voluntarily to the CID office on 20 August 1982 and that he submitted to further interrogation after again knowingly, intelligently, voluntarily, and affirmatively waiving his Article 31 and *Miranda/Tempia* rights.

We find that the appellant's request to speak to the McBrides did not constitute an assertion of any right provided by Article 31, *Miranda/Tempia*, or any other constitutionally, statutorily, or judicially created rule of law. A suspect does not have the right to consult with friends or relatives prior to criminal interrogation; he has the right to consult with legal counsel. The record reflects that the McBrides were friends of the accused, not lawyers. Thus, the CID could have denied his request to see them.

We further find that the McBrides were neither agents nor employees of the CID and that they neither assisted the CID in the interrogation of the accused nor in any manner acted on behalf of the government during their visit with the appellant at the CID office.

We find that the military judge did not breach his discretion in making findings of fact concerning the defense's suppression motion, and we find those facts to be true and accurate.

Finally, while it is true that "[t]he government must prove the voluntariness of confession by a preponderance of the evidence," and that "[e]vidence of psychological coercion is to be considered among the totality of the circumstances involved in determining whether a statement is voluntary under the fifth amendment," *United States v. Veach*, CM 441900 (A.C.M.R. 24 Aug. 1982) (unpub.); *see also Spano v. New York*, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959); *United States v. Collier*, 1 M.J. 358, 366-67 (C.M.A. 1976), the Court finds that the government met its burden of proving that the appellant's inculpatory statement (Prosecution Exhibit 2) was voluntary. *See Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972). Consequently, we conclude that the appellant's statement was properly admitted into evidence.

V. ALLEGED PRETRIAL ADVICE DEFICIENCIES

The appellant asserts that the military judge erred by denying the appellant's motion for a new pretrial advice. We disagree.

With respect to the appellant's request for a new pretrial advice, we note that "[t]he test for materiality is whether there is a fair risk the omission of fact would mislead the convening authority in his prosecutorial decision to determine the appropriate level of court-martial or what charges should be referred." *United States v. Clements*, 12 M.J. 842, 845 (A.C.M.R. 1982), *pet. denied*, 13 M.J. 232 (C.M.A. 1982). Even had the pretrial advice been accurate in every detail, we find the appropriate level of referral in this case to have been a general court-martial. The minor irregularities in the instant pretrial advice neither misled the convening authority nor caused him inappropriately to refer this case to a general court-martial.[2] Consequently, we find this assignment of error to be without merit.

VI. VIDEO TAPES OF PSYCHIATRIST'S INTERVIEW OF APPELLANT

Appellant asserts that the military judge erred by refusing to admit into evidence video tapes of the interviews of appellant conducted by his civilian psychiatrist, Dr. Rollins.

Defense sought the admission of these tapes prior to findings. These interviews included a period during which the appellant was under hypnosis. The military judge denied admission of these tapes because he did not find it essential that the court receive into evidence all research and investigative

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[2] We note that effective 1 August 1984, pursuant to R.C.M. 406(b), the pretrial advice need no longer contain a summary of the evidence. The discussion of that rule, which constitutes persuasive secondary authority, suggests that a summarized discussion of the evidence may be included when appropriate. Failure to include such information will not, however, constitute error. In light of the new rules for courts-martial, assignments of error such as this should soon be eliminated.

results which formed the basis for Dr. Rollins' expert opinion in order to evaluate the weight to be given that testimony. The defense asserted that this evidence should be admitted because its probative value substantially outweighed any possible prejudice inherent in its admission. Mil.R.Evid. 403. We find the military judge's decision to exclude this evidence consistent with Mil.R.Evid. 403 and 703.

With respect particularly to the portion of the interview during which the appellant was under hypnosis, it should be noted that these portions were not *per se* inadmissible. *See State v. Nims*, 180 Conn. 589, 430 A.2d 1306 (1980); *People v. Blair*, 25 Cal.3d 640, 159 Cal.Rptr. 818, 833 fn. 24, 602 P.2d 738, 753 fn. 24 (1979). We find, however, that there was substantial basis for the military judge's decision to exclude this evidence. *See State v. Harris*, 241 Or. 224, 405 P.2d 492, 499-500 (1965) (video-taped statements of the defendant while under hypnosis excluded from evidence due to potential for confusion and because court members would likely be unable to consider the tapes for purposes other than the truth of the statements contained therein). Exclusion of this evidence does not, therefore, constitute an abuse of discretion. *See State v. Harris, supra; People v. Modesto*, 59 Cal.2d 722, 31 Cal.Rptr. 225, 382 P.2d 33, 382 P.2d 33, 39-40 (1963). We find similarly as to those portions of the videotapes during which the appellant was not under hypnosis.

> Admitting evidence tending to show the accused's consciousness of guilt is an accepted principle of military jurisprudence. . . . However, balancing the probative value of such evidence against its prejudicial effect is a task for the trial judge, and unless there is a showing of abuse, his discretion will not be overturned.

United States v. Borland, 12 M.J. 855, 857 (A.F.C.M.R. 1981). *Accord United States v. Woodyard*, 16 M.J. 715, 718 (A.F.C.M.R. 1983); *United States v. Barus*, 16 M.J. 624, 626 (A.F.C.M.R. 1983); *see also United States v. Henry*, 1 M.J. 533, 535 (A.F.C.M.R. 1975). We find no such abuse in this case and we find that the military judge exercised sound discretion in the procedure he utilized in disposing of this issue.

VII. PRETRIAL CONFINEMENT SENTENCING INSTRUCTION

Appellant asserts that the military judge erred by failing to instruct the court members that, in adjudging an appropriate sentence, they should consider time spent by the appellant in pretrial confinement. The Manual for Courts-Martial does not mandate such an instruction. It does, however, state that tailored instructions should inform court members that they "may consider all matters in extenuation and mitigation. . . ." Paragraph 76*b*(1), MCM, 1969. In *United States v. Davidson*, 14 M.J. 81, 86 (C.M.A. 1982), it was held that the military judge must "particularly delineate" factors such as pretrial confinement in the sentencing instructions to court members. However, the *Davidson* case occurred at a time when a convicted servicemember's sentence to confinement was not automatically credited for time served in pretrial confinement either judicially or administratively. Such is not now the case. In *United States v. Allen*, 17 M.J. 126, 128 (C.M.A. 1984), the Court of Military Appeals held that Department of Defense Instruction 1325.4 "voluntarily incorporat[ed] the pretrial-sentence credit extended to other Justice Department convicts." This ruling applied "retroactively to cases under review as to sentences to confinement still being served." 17 M.J. at 128. The Department of Defense did not modify the operative language of its Instruction following this decision. The Army immediately implemented a policy requiring that confinement facilities administratively credit the sentences of prisoners (including those whose cases were no longer undergoing review) with one day for each day of pretrial confinement served. Appellant clearly is within the category of prisoners entitled to such credit.

An instruction which would merely advise the court to consider as a matter in mitigation time spent in pretrial confinement, without also advising the court of the Army's administrative pretrial confinement credit procedure, would be misleading. The military judge normally should give sentencing instructions tailored to advise the court of any pretrial restraint imposed upon the accused. *United States v.*

Davidson, supra. However, he equally is obligated not to misadvise or mislead the court. Since *Allen, supra,* the nature of appropriate pretrial confinement sentencing instructions has changed. As stated by Chief Judge Everett: "[I]n instructing court members, a military judge can specifically advise them *how pretrial confinement is treated* for sentencing purposes." *Id.* at 130 (Everett, C.J., concurring) (emphasis added). Thus, since *Allen,* a proper sentencing instruction also should inform the court of the administrative credit to be given the accused for time spent in pretrial confinement[3] in order to avoid the windfall which may accrue to the accused due to the actions of a misinformed court.

Considering the circumstances of this case, we find that the failure of the military judge to give a tailored pretrial confinement instruction was not plain error and that the issue was waived by defense counsel's failure to make a timely objection to the military judge's instructions at trial. Assuming, *arguendo,* that waiver is inapplicable in this case (although since *Allen, supra,* the effect of pretrial confinement on an accused's sentence is quite different than it was when the Court rendered its decision in *Davidson, supra*), we nonetheless find beyond a reasonable doubt that in view of the nature of accused's crime and the administrative credit to which he is entitled for pretrial confinement served, any error which may have resulted from the judge's failure to give a tailored pretrial confinement instruction is harmless.

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[3] While various forms of instructions regarding pretrial confinement will suffice, an example of an acceptable instruction would be:

> In selecting a sentence, you should consider all matters in extenuation and mitigation (as well as those in aggravation,) (whether introduced before or after the findings). (All the evidence admitted in this case is relevant on the subject of sentencing.) Consequently, you should consider evidence admitted as to: . . . . In determining an appropriate sentence in this case, you should consider the fact that the accused has spent ____ days in pretrial confinement. In this connection, you should consider the fact that if you adjudge confinement at hard labor as part of your sentence, the ____ days (he) (she) spent in pretrial confinement will be credited against any sentence to confinement you adjudge. This credit will be given by the authorities at the correctional facility where the accused is sent to serve confinement and will be given on a day-for-day basis.

VIII. SENTENCE APPROPRIATENESS

We find that considering the entire record the appellant's approved sentence is not inappropriate. Accordingly, the sentence will not be reassessed.

We have considered the other issues personally raised by appellant and briefed by his counsel and find them to be without merit.

The findings of guilty and the sentence are affirmed.

Chief Judge SUTER and Judge COHEN concur.

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(2)

No. 87-692

In the Supreme Court of the United States

OCTOBER TERM, 1987

CHARLES M. STARK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial court abused its discretion by excluding a videotape of petitioner's interview with a defense psychiatrist.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-9a) is reported at 24 M.J. 381. The opinion of the Army Court of Military Review (Pet. App. 10a-25a) is reported at 19 M.J. 519.

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 31, 1987. The petition for a writ of certiorari was filed on October 29, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Following a general court-martial at Fuerth, West Germany, petitioner, a member of the United States Army, was convicted of murder, in violation of Article 118, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918. The Army Court of Military Review affirmed the findings and sentence (Pet. App. 10a-25a). Upon discre-

tionary review, the Court of Military Appeals also affirmed (Pet. App. 1a-9a).

1. Emily Stark arrived in Fuerth, Germany, on August 8, 1982, to join petitioner, her husband. Eleven days later, petitioner killed his wife by suffocating her on a deserted road near the house where she was staying (GXs 2, 6; Tr. 558-560, 581-582).

2. a. Petitioner later retained a forensic psychiatrist, Dr. Robert Rollins, to assess his sanity at the time of the crime (Tr. 574). Dr. Rollins interviewed petitioner at Nuremberg, Germany, on September 9 and 10 and videotaped the interviews, which lasted a total of about five hours (Tr. 535, 557, 578, 593, 732).[1] Dr. Rollins, petitioner, and his defense counsel were the only persons present (see Tr. 681). Dr. Rollins claimed that he hypnotized petitioner to enhance petitioner's concentration on the events of the crime (Tr. 659-660, 736).

At trial, petitioner relied exclusively on an insanity defense presented through Dr. Rollins.[2] Before Dr. Rollins testified, defense counsel moved to admit the videotapes of his interviews of petitioner. The defense claimed that the tapes were admissible on the ground that they demonstrated the basis for Dr. Rollins' opinion, that the tapes were a statement against petitioner's interest, and that they were not hearsay, because they were not offered for the truth of the matters asserted (Tr. 535-541).[3] The government objected on the grounds that the videotapes would mislead the court members and would allow peti-

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[1] The Court of Military Appeals stated that the tapes would have allowed petitioner to present eight hours of testimony (Pet. App. 8a). That court appears to have erred in suggesting that the videotapes were eight hours long.

[2] Petitioner did not testify at trial.

[3] See Mil. R. Evid. 403, 703, 801(c), and 804(b)(3). Those provisions are identical to the corresponding provisions in the Federal Rules of Evidence.

tioner to testify without being cross-examined (Tr. 536). The trial judge refused to admit the videotapes, but stated that Dr. Rollins could testify about the procedures he used and the bases for his opinion (Tr. 537-538).

Thereafter, Dr. Rollins testified that petitioner had a "passive/aggressive personality" and suffered from an "adjustment disorder with mixed disturbance of emotions and conduct" (Tr. 551, 568). Dr. Rollins found it "probable or likely" that petitioner lacked substantial capacity to conform his conduct to the requirements of the law (Tr. 573; see Tr. 569). In rebuttal, the prosecution called two psychiatrists, Dr. John Traylor and Dr. Gilbert Eggen, and a forensic psychologist, Dr. Harold Hall, who had separately examined petitioner before trial as members of a sanity board.[4] Each expert testified that petitioner suffered from a personality disorder,[5] but that petitioner did not lack a substantial capacity to conform his conduct to the requirements of law or to appreciate the criminality of his conduct (Tr. 615-616, 661-662, 710).

b. The question whether petitioner had been hypnotized during the interviews by Dr. Rollins came up when Dr. Hall testified for the government in rebuttal.[6] Based in

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[4] Pursuant to para. 121 of the *Manual for Courts-Martial, United States – 1969* (rev. ed.), a sanity board could be convened by the convening authority prior to trial if an inquiry into the mental condition of the accused was necessary, and in this case the convening authority ordered such an inquiry (Tr. 607-610). The board was required to examine petitioner and to render findings as to whether petitioner had the capacity to understand and participate in the proceedings against him, and whether he lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. *Ibid.*

[5] Dr. Traylor and Dr. Hall diagnosed petitioner as having a mixed personality disorder and a history of alcohol abuse (Tr. 612-613, 661). Dr. Eggen's diagnosis indicated an anti-social personality disorder and alcohol abuse (Tr. 710-712).

[6] Dr. Hall wrote his master's degree thesis on hypnosis and memory under varying conditions (Tr. 653).

part on the results of the psychological tests administered to petitioner[7] and his own review of the videotaped interviews, Dr. Hall concluded that Dr. Rollins had misdiagnosed petitioner. Dr. Hall indicated that he had reviewed approximately 90 minutes of the videotaped interviews, including much of the portion where petitioner was allegedly hypnotized (Tr. 656). Dr. Hall criticized the hypnotic interview used by Dr. Rollins. Dr. Hall stated, inter alia, that the period during which petitioner was allegedly placed under hypnosis was too short to produce the requisite trance for forensic purposes, and that petitioner was not really under hypnosis, since he reacted to some environmental sounds, although he slightly modified his criticisms during cross-examination (Tr. 663-664, 681-682, 684).[8] Dr. Hall was also of the opinion that petitioner attempted to influence the results of the psychological tests (Tr. 669, 694-698).

Dr. Rollins responded to the criticisms in surrebuttal. He testified that he used a special, rapid-induction method known as the "Spiegel Technique" to place petitioner under hypnosis. He also said that only a light trance was necessary to achieve his purpose, and that petitioner was

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[7] During the interview, Dr. Rollins administered a psychological test, the Minnesota Multiphasic Personality Inventory (MMPI). Dr. Hall also administered the MMPI to petitioner as part of his examination (Tr. 655). Dr. Hall testified that the results of the MMPI conducted by Dr. Rollins were similar to and consistent with the MMPI tests that he administered (Tr. 672-674).

[8] Dr. Hall also stated that (1) Dr. Rollins' suggestions when inducing hypnosis were designed to induce relaxation, rather than deep concentration; (2) there was an unacceptable level of background noise during the session; and (3) petitioner could not levitate his hand without assistance, indicating that he was under only a light or medium trance. On cross-examination, Dr. Hall stated that petitioner's reaction to noise was less than would ordinarily occur and that petitioner's arm remained in an elevated position during the session (Tr. 681-682, 684).

in a light trance (Tr. 734-736). Dr. Rollins also denied that petitioner reacted to noises while he was hypnotized (Tr. 736). The court members then recalled Dr. Hall.[9] He testified that he did not know of the "Spiegel Technique" by name, but that there were several hundred different methods of hypnotic induction (Tr. 760-761). He also said that the technique used by Dr. Rollins was not a common method for inducing hypnotism, because it did not use a progression of suggestions, which is the general practice, and that he had "some misgivings" about Dr. Rollins' technique (Tr. 761).

Defense counsel renewed his request to admit the tapes after Dr. Rollins testified in surrebuttal, and the trial judge again denied the request (Tr. 749-757). The judge explained that exhibiting the videotapes was unnecessary to allow the trier of fact to decide what weight to give to Dr. Rollins' testimony, and that playing the videotapes was a "lefthanded way" of allowing petitioner to testify without undergoing cross-examination (Tr. 755-757).[10]

ARGUMENT

1. There is no conflict among the circuits on the question presented by this case. Only two federal courts of appeals have addressed the admissibility of videotapes of interviews with the accused in similar situations, and the decisions of both courts are fully consistent with the ruling of the Court of Military Appeals in this case. In *United*

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[9] Members of a court-martial panel are permitted to request that witnesses be called and, through the military judge, to question them. Art. 46, UCMJ, 10 U.S.C. 846; *1969 Manual,* para. 54*b*.

[10] During sentencing, the trial judge allowed petitioner to play a portion of the taped interviews in which he described his relationship with his wife (Tr. 877-894). The evidence was admitted as part of petitioner's "unsworn statement." The accused is permitted to make an unsworn statement (or to testify) to assist the panel members fix an appropriate sentence. *1969 Manual* para. 75*c*(2).

States v. *McCollum,* 732 F.2d 1419 (9th Cir.), cert. denied, 469 U.S. 920 (1984), the defendant did not testify, but sought to introduce a videotaped interview with a forensic hypnotist during which the defendant recounted an allegedly "enhanced" version of the events while supposedly under hypnosis. The court of appeals upheld the trial court's exclusion of the videotape, holding that a trial judge has the discretion to exclude such evidence. 732 F.2d at 1422-1423. The trial judge did not abuse his discretion, the Ninth Circuit held, since the defense expert was able to describe the accused's statements while he was allegedly under hypnosis and because admitting the videotapes would have permitted the defendant to offer testimony without subjecting himself to cross-examination by the government. *Ibid.* Accord *United States* v. *Hearst,* 563 F.2d 1331, 1348-1349 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978) (the trial judge did not abuse his discretion in denying the admission of a one and three-quarters hour taped interview when the psychiatrists were fully capable of communicating to the jury the bases of their opinions and the defense did not seek to introduce only a representative sample of the tapes). Similarly, in *United States* v. *Mest,* 789 F.2d 1069 (4th Cir. 1986), cert. denied, No. 85-7202 (Oct. 6, 1986), the court of appeals, relying on *McCollum,* upheld the exclusion of the videotape of a psychiatric interview of the defendant while he was allegedly under hypnosis, for the same reasons given by the Ninth Circuit in *McCollum.* 789 F.2d at 1073-1074. None of the cases cited by petitioner are to the contrary.[11]

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[11] Only one of the cited cases is similar to this one, and the court in that case did not decide the question presented here. *Pratt* v. *State,* 39 Md. App. 442, 453, 387 A.2d 779, 786 (1978) (not deciding whether trial court erred in refusing to admit videotape of psychiatric interview of defendant), aff'd on other grounds, 284 Md. 516, 398 A.2d 421 (1979). The remaining cases are inapposite. See *United States* v. *Torniero,* 735 F.2d 725 (2d Cir. 1984), cert. denied, 469 U.S. 1110 (1985)

2. A trial judge has considerable discretion in making the determination whether the probative value of evidence outweighs its prejudicial effect, and his decision will not be reversed on appeal unless he abuses that discretion. *Hamling* v. *United States,* 418 U.S. 87, 124-125, 127 (1974). In this case, the trial judge did not abuse his discretion, for several reasons.

First, a defendant does not have the right to testify without being subject to cross-examination by the government. *E.g., McGautha* v. *California,* 402 U.S. 183, 216 (1971); *Brown* v. *United States,* 356 U.S. 148 (1958); *Fitzpatrick* v. *United States,* 178 U.S. 304, 314-316 (1900). The trial court was properly concerned that admitting the videotapes would have allowed petitioner to evade the government's right to challenge his statements and actions during the interviews with Dr. Rollins. See *United States* v. *Mest,* 789 F.2d at 1073; *United States* v. *McCollum,* 732 F.2d at 1423; *State* v. *Chase,* 206 Kan. 352, 480 P.2d 62 (1971) (even when a proper limiting instruction is given,

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(compulsive gambling cannot establish an insanity defense); *United States* v. *Clifford,* 704 F.2d 86 (3d Cir. 1983) (district court erred in refusing to permit the government to introduce examples of the defendant's cursive handwriting); *United States* v. *McRary,* 616 F.2d 181 (5th Cir. 1980) (trial court erred in excluding the testimony of the accused's wife and the defense psychiatrist and psychologist in support of an insanity defense); *United States* v. *Ives,* 609 F.2d 930 (9th Cir. 1979), cert. denied, 445 U.S. 919 (1980) (trial court erred in excluding all of the accused's medical records for a five-year period); *United States* v. *Ariza-Ibarra,* 605 F.2d 1216 (1st Cir. 1979) (trial court did not erroneously admit the entire transcript of a recorded conversation between the defendant and a co-conspirator); *United States* v. *Dwyer,* 539 F.2d 924 (2d Cir. 1976) (trial court erred in prohibiting second defense psychiatrist from testifying); *United States* v. *Onori,* 535 F.2d 938 (5th Cir. 1976) (trial court's handling of proposed prosecution and defense versions of the transcripts of recorded conversations was not reversible error); *United States* v. *Smith,* 507 F.2d 710 (4th Cir. 1974) (trial court erred in denying defendant opportunity to show past period of abnormal behavior to support an insanity defense).

there is a danger that the trier of fact will consider videotapes for the substantive content of the subject's statements).[12]

Petitioner's claim (Pet. 8) that the videotapes were "demonstrative" rather than "testimonial" evidence is not supported by his actions at trial. The dispute between the experts for the government and the defense was primarily over Dr. Rollins' hypnotic technique, which occupied only a small portion of the videotapes, but petitioner did not seek to introduce only that portion to support Dr. Rollins' conclusions. Petitioner's attempt to introduce the entire videotape supports the trial judge's conclusion that petitioner was making a "left-handed" attempt to testify.

Second, exclusion of the videotapes did not materially interfere with petitioner's opportunity to present his insanity defense. The question for the trier of fact to decide was whether petitioner was sane at the time of the crime, and petitioner had a full and fair opportunity to present his insanity defense to the court-martial panel. The trial judge placed no limitation on petitioner's opportunity to testify in his own defense, on Dr. Rollins' ability to give his opinion as to petitioner's sanity, or on Dr. Rollins' opportunity to explain the bases of that opinion, including describing petitioner's mental state during the interviews while petitioner was allegedly under hypnosis. Whether petitioner in fact was under hypnosis during the interviews was, at most, only a peripheral matter at trial. In these circumstances, the trial judge's ruling did not undermine petitioner's ability to offer an insanity defense or to bolster the opinions of his expert. See *United States* v. *McCollum*, 732 F.2d at 1423; *United States* v. *Hearst*, 563 F.2d at 1349; see also *United States* v. *Mest*, 789 F.2d at 1074.

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[12] There is no merit to petitioner's analogy (Pet. 7) between his videotapes and the photographs used by the pathologist to explain the cause of the victim's death (Tr. 464-470). The autopsy photographs did not present a matter reasonably subject to dispute, and the skill with which the autopsy was performed was not questioned.

Finally, playing the videotapes would have been extraordinarily time-consuming for a matter of marginal relevance, at most. As we have noted, petitioner did not attempt to introduce just a representative sample of the interviews, rather than all five hours of videotapes. Five hours of videotapes on a peripheral subject would have unduly burdened the trier of fact, and it was within the trial judge's discretion to exclude the videotape on that ground. *United States* v. *Hearst*, 563 F.2d at 1349.[13]

3. Petitioner's reliance (Pet. 7, 11) on *Rock* v. *Arkansas*, No. 86-130 (June 22, 1987), and *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), is misplaced. To begin with, petitioner did not claim at trial that the trial judge's ruling violated the Compulsory Process Clause (Tr. 534-540, 749-756), nor did petitioner argue on appeal that the Compulsory Process Clause was violated. In fact, petitioner conceded at trial that the admissibility of the videotapes was within the trial court's discretion (Tr. 539, 751). Petitioner has therefore waived his Compulsory Process claim. In any event, that claim lacks merit.

In *Chambers* and *Rock*, the evidentiary rule at issue arbitrarily denied a defendant the opportunity to introduce crucial exculpatory evidence, and the Court's ruling in each case was limited to restrictions of that type. *Rock*, slip op. 11.[14] By contrast, the trial court in this case did

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[13] Petitioner is wrong in claiming (Pet. 7, 8) that the trial judge should have viewed the tapes before ruling on their admissibility. By the time the experts had finished their testimony, the trial judge was aware of the contents of the tapes and therefore could rule on the admissibility of the tapes without examining them himself. *United States* v. *Hearst*, 563 F.2d at 1349 n.14.

[14] *Chambers* v. *Mississippi* found invalid the combined application of the state's voucher rule, under which a defendant was bound by the testimony of a defense witness, who could not be cross-examined, and the state's hearsay rule, which "mechanistically" excluded testimony that bore assurances of trustworthiness and was corroborated by other evidence. 410 U.S. at 296, 302. In *Rock* v.

not arbitrarily exclude crucial defense evidence. The defense expert was free to explain the bases for his conclusions, and the defendant was free to testify. Both parties had an equal opportunity to attack and defend the credibility of the experts. By denying petitioner the opportunity in effect to testify free from cross-examination, the trial judge simply ensured that the prosecution and the defense were on an equal footing.[15]

Arkansas, the Court ruled that a state may not adopt a per se rule prohibiting a defendant from offering his own hypnotically refreshed testimony. The Court explained that, absent clear proof that all hypnotically refreshed testimony is too unreliable to allow before the jury, a per se rule arbitrarily restricts the defendant's opportunity to offer potentially exculpatory testimony that could be proved reliable in his own case. Slip op. 17.

[15] Petitioner asserts (Pet. 5) that the courts below created a per se rule excluding videotapes of hypnotically enhanced testimony. That assertion is in error. The Court of Military Appeals explicitly stated that such evidence is not per se inadmissible. Pet. App. 6a ("although we agree with the Court of Military Review's conclusion that the tapes were not *per se* inadmissible because of the influence of 'hypnosis' on the interviews, we do not attempt to fashion a rule of law governing this type of testimony"). The decisions of the courts below were therefore not in any way inconsistent with this Court's conclusion in *Rock* v. *Arkansas, supra,* that a state may not adopt a per se rule prohibiting the defendant from testifying after her recollection is hypnotically refreshed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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